



Advisory Opinion 09-012

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2008). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On April 27, 2009, the Information Policy Analysis Division received an email from Marsha West, Legal Editor for the Appeals and Regulations Division at the Minnesota Department of Human Services (DHS). In her email, Ms. West asked the Commissioner to issue an advisory opinion regarding the classification of certain data DHS maintains.

A summary of the facts Ms. West provided is as follows. In her opinion request, she wrote:

The [Alcohol and Drug Abuse Division (ADAD) of DHS] issued a grant request for proposal...in which they were seeking responders who would provide services to individuals who were in need of chemical dependency treatment. The ADAD would then enter into grant contracts with the responders they have selected. Before awarding these grant contract [sic] and in accordance with Minnesota Statutes, section 254A.07, ADAD must submit a listing of all responders to their grant RFP to whom ADAD is considering awarding a grant contract for county board approval....

Since the evaluation data is protected nonpublic data until completion of the evaluation process, I told ADAD to draft a consent form and obtain written consent from responders to whom they would like to award a grant contract so that DHS could share this information with the county board. Consent was authorized by these responders and the ADAD provided copies of preliminary award letters to Hennepin County staff and the board.

Issues:

Based on Ms. West's opinion request, the Commissioner agreed to address the following issues:

1. Pursuant to Minnesota Statutes, Chapter 13, can the Minnesota Department of Human Services share private or nonpublic grant response data with the Hennepin County Board and staff, and can the Board discuss these data in an open meeting?
2. Pursuant to Minnesota Statutes, Chapter 13, can the Minnesota Department of Human Services share data it creates or maintains as part of its grant evaluation process (prior to the evaluation being completed) with Hennepin County Board and staff, and can the Board discuss these data in an open meeting?

Discussion:

Issue 1: *Pursuant to Minnesota Statutes, Chapter 13, can the Minnesota Department of Human Services share private or nonpublic grant response data with the Hennepin County Board and staff, and can the Board discuss these data in an open meeting?*

Pursuant to Minnesota Statutes, Chapter 13, government data are public unless otherwise classified. (Minnesota Statutes, section 13.03, subdivision 1.)

Minnesota Statutes, section 13.599, classifies data related to grants that state agencies award. Subdivision 3 of section 13.599 classifies data that grantees submit in responses to requests for proposals. Of relevance here is clause (a):

(a) Responses submitted by a grantee are private or nonpublic until the responses are opened. Once the responses are opened, the name and address of the grantee and the amount requested is public. All other data in a response is private or nonpublic data until completion of the evaluation process. After a granting agency has completed the evaluation process, all remaining data in the responses is public with the exception of trade secret data as defined and classified in section 13.37. A statement by a grantee that the response is copyrighted or otherwise protected does not prevent public access to the response.

Ms. West has asked the Commissioner to comment on situations in which the grantees' bids have been opened but in which the evaluation process is not yet complete. Thus, pursuant to section 13.599, subdivision 3(a), the names and addresses of the grantees are public and so is the amount each grantee has requested. All other data in the responses are not public.

Subdivision 4, clause (b) of section 13.599 states:

(b) If a granting agency asks individuals outside the granting agency to assist with the evaluation of the responses, the granting agency may share not public data in the responses with those individuals. The individuals participating in the evaluation may not further disseminate the not public data they review.

Ms. West states that under Minnesota Statutes, section 254A.07, DHS must "submit a listing of all responders to their grant RFP to whom [DHS] is considering awarding a grant contract for county board approval." Thus, DHS is asking (because they are required to do so) the Hennepin County Board and staff to assist with the evaluation of the responses. Under section 13.599, subdivision 4(b), DHS can share the private and nonpublic data in the responses but the Board and staff cannot further disseminate the information.

As part of the first issue, Ms. West asked whether the County Board can discuss, in a public meeting, the private/nonpublic data in the responses. One way to accomplish this is for DHS to obtain informed consent from the subjects of the data, i.e., the grantees. (Minnesota Statutes, section 13.05, subdivision 4(d) and Advisory Opinion 03-014.)

In addition, the Open Meeting Law (Minnesota Statutes, Chapter 13D) provides the following: "[Not public data] may be discussed at a meeting subject to this chapter without liability or

penalty, if the disclosure relates to a matter within the scope of the public body's authority and is reasonably necessary to conduct the business or agenda item before the public body." (Section 13D.05, subdivision 1.) It seems, in this case, given there is a statute requiring that the Board approve DHS' grants, the matter is certainly within the scope of the Board's authority and some discussion of private/nonpublic data may be necessary for the board to make its decision.

Issue 2: Pursuant to Minnesota Statutes, Chapter 13, can the Minnesota Department of Human Services share data it creates or maintains as part of its grant evaluation process (prior to the evaluation being completed) with Hennepin County Board and staff, and can the Board discuss these data in an open meeting?

Subdivision 4(a) of section 13.599 classifies evaluation data created or maintained by a granting agency as part of the evaluation process:

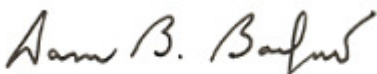
(a) Data created or maintained by a granting agency as part of the evaluation process referred to in this section are protected nonpublic data until completion of the evaluation process at which time the data are public with the exception of trade secret data as defined and classified in section 13.37.

The classification of protected nonpublic is the most restrictive of the classifications in Chapter 13. It means that only those staff within the government entity who need the data to do their jobs can get access to the data. The data are not available to the public or even to the data subjects. Because data subjects cannot gain access to the data, they do not have the right to give consent for the data to be released to persons outside the entity. Thus, DHS cannot share its evaluation process data with the County Board. Because DHS cannot share these data with the County Board, the issue of whether the Board can discuss the data in an open meeting is moot.

Opinion:

Based on the facts and information provided, my opinion on the issues that Ms. West raised is as follows:

1. Pursuant to Minnesota Statutes, section 13.599, subdivision 4(b), the Minnesota Department of Human Services can share private or nonpublic grant response data with the Hennepin County Board and staff. Pursuant to Minnesota Statutes, section 13D.05, subdivision 1, the Board may discuss the private or nonpublic data in an open meeting "if the disclosure relates to a matter within the scope of the public body's authority and is reasonably necessary to conduct the business or agenda item before the public body." The Board is in the best position to make this determination.
2. Because Minnesota Statutes, section 13.599, subdivision 4(a), classifies grant evaluation data as protected nonpublic, the Minnesota Department of Human Services cannot share its evaluation process data with Hennepin County Board and staff. Because DHS cannot share these data with the County Board, the issue of whether the Board can discuss the data in an open meeting is moot.

Signed: 
Dana B. Badgerow
Commissioner

Dated: May 8, 2009